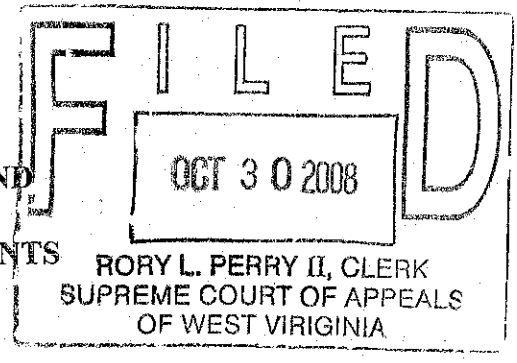
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34269



ANN MORGAN ZIMMERER AND GERALD LEE ZIMMERER, PLAINTIFFS BELOW, APPELLANTS

VS.

MARK E. ROMANO, ROBIN J. ROMANO AND WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, DEFENDANTS BELOW, APPELLEES

HONORABLE GARY L. JOHNSON, JUDGE
CIRCUIT COURT OF NICHOLAS COUNTY
CIVIL ACTION NO. 04-P-50

RESPONSE BRIEF OF APPELLEES MARK E. ROMANO AND ROBIN J. ROMANO

Counsel for Appellants

Ancil G. Ramey, Esq.
WV Bar No. 3013
Hannah B. Curry, Esq.
WV Bar No. 7700
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8112

Counsel for Romano Appellees

Gregory A. Tucker, Esq.
WV Bar No. 3810
Gregory A. Tucker, P.L.L.C.
719 Main Street
Summersville, WV 26651
Telephone: (304) 872-2500

Counsel for WVDOH Appellee

G. Alan Williams, Esq.
WV Bar No. 6214
WVDOH-Legal Division
Room 519, Capitol Building 5
1900 Kanawha Boulevard East
Charleston, WV 25305
Telephone: (304) 558-9301

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I. INTRODUCTION

This is a response on behalf of the respondents, Mark E. Romano and Robin J. Romano, to the appeal by petitioners, Ann Morgan Zimmerer and Gerald Lee Zimmerer, of a Final Order entered by the Circuit Court of Nicholas County, West Virginia, awarding summary judgment in favor of the Romanos. The parties in this case by agreement submitted their respective motions for summary judgment for determination by the Circuit Court of Nicholas County, West Virginia. The lower court found that the West Virginia Department of Transportation, Division of Highways, properly transferred to Romanos an area of right-of-way containing 1.18 acres, being part of 20.29 acres, more or less.

By Final Order entered August 18, 1971 in that certain civil action styled *West Virginia Department of Highways vs. William Guy Hill, et al.*, Civil Action No. 2127, the West Virginia Department of Highways was vested with title to a right-of-way over the subject property by virtue of its condemnation of the subject 20.29 acres, more or less.[1] Said right-of-way is broken down as 12.99 acres, 3.82 acres and 3.48 acres, more or less, totaling 20.29 acres, more or less.

The Romanos are the owners of the residue of the tract from which the 20.29 acres of right-of-way derived being a tract originally containing 82.65 acres, more or less. Said 82.65 acres less the 20.29 acres of right-of-way previously vested in the West Virginia Department of Highways by the aforementioned Order is the same real estate conveyed to the defendants by deed of Greenwood Timber, Inc., a West Virginia corporation, dated November 19, 1998 and recorded in the Office of

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[1]See Exhibit No. 1 to Romanos' Second Motion for Summary Judgment.

the Clerk of the County Commission of Nicholas County, West Virginia in Deed Book 388 at page 748.[2]

The Circuit Court properly concluded that the Division of Highways had a statutory duty pursuant to *West Virginia Code* §17-4-47(4)(b) to provide Romanos with access to the public highway which was accomplished by the transfer of the 1.18 acre right-of-way. Further, the Circuit Court properly concluded that the Romanos were abutting land owners as defined under *West Virginia Code* §17-2A-19 and that the Zimmerers were not "principal abutting land owners" as defined therein. As the Zimmerers were not principal abutting land owners, they were not entitled to priority in the purchase of said excess right-of-way. Finally, the Circuit Court properly concluded that the Zimmerers had no title to the underlying or servient estate which is the subject of the underlying action for the reason that their predecessors conveyed all of their right, title and interest in and to said servient estate to the Romanos' predecessors in title, Greenwood Timber.[3]

II. STATEMENT OF FACTS

The property which is the subject of the underlying proceedings is an area comprised of 20.29 acres, being a part of an original 82.65 acres Hill tract. The 20.29 acres does not encompass any portion of other properties of the Zimmerers. It does not encompass any property previously owned by the appellants or their predecessors in title. In 1971, pursuant to condemnation proceedings, the West Virginia Department of Highways acquired three tracts of non-controlled access right-of-way totaling 20.29 acres of the original Hill property. Subsequently, the Romanos' predecessor in title, Greenwood Timber, obtained title to the 82.65 acre Hill tract. In fact, the Hill heirs deed to

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[2] See Exhibit No. 2 to Romanos' Second Motion for Summary Judgment.

[3] See Exhibit No. 3 to Romanos' Second Motion for Summary Judgment.

Greenwood Timber contains a meets and bounds description of the entire original 82.65 acre tract. Thereafter, said deed recites that there was reserved only the 20.29 acres of right-of-way previously vested in the West Virginia Department of Highways. The deed contains no language that reserves to the Hills any portion of the residue of the 82.65 acre parcel. Greenwood Timber subsequently conveyed said tract to the Romanos reserving only the 20.29 acres previously vested in the Department of Highways and additional lands which are not part of these proceedings.

Subsequently, the West Virginia Department of Transportation, Division of Highways, determined that a portion of said lands taken in the 1971 condemnation action were no longer necessary for public highway purposes. The Department of Transportation, recognizing its obligation pursuant to *West Virginia Code* §17-4-47(4)(b) to provide the Romanos with a right-of-way to the public highway and further that the Romanos were abutting land owners as defined under *West Virginia Code* §17-2A-19, conveyed 1.18 acres of the excess right-of-way to Romanos.

Prior to 2002, Ann Morgan Zimmerer obtained various quit claim deeds from the Hill heirs purporting to convey to her any right, title and interest the Hill heirs had in and to the 20.29 acres. However, as noted, this is contrary to the language contained in the deed from the Hill heirs to Greenwood Timber.

At approximately the same time of the transfer from the Department of Transportation to the Romanos, Ann Morgan Zimmerer obtained excess right-of-way from the Department of Transportation abutting other lands owned by her. The effect of transferring to Ann Morgan Zimmerer the excess right-of-way which ultimately was conveyed to the Romanos, would have been

to landlock the Romanos.[4] Consequently, the Department of Transportation would have been in violation of *West Virginia Code* §17-4-47(4)(b) which compels the State of West Virginia to provide the Romanos with a right-of-way to the public highway.

Additionally, it is clear that the director of the Department of Transportation has wide discretion in conveying excess right-of-way. In this particular case, the Director did not abuse his discretion in light of the Department's statutory duty to provide Romanos with access to the public highway. This is exactly what was accomplished in conveying to the Romanos the 1.18 acres of right-of-way previously vested in the Department of Transportation. As the Department of Transportation met its statutory burden, the remainder of the Zimmerers' claims were moot. Consequently, there were no genuine issues of fact to be determined and the Court properly entered judgment in favor of the Romanos on the issues presented to the Court.

Therefore, the circuit court was correct in determining that the deed from the Hill heirs to Greenwood Timber only reserved the right-of-way previously acquired by the West Virginia Department of Transportation by virtue of the condemnation proceedings in 1971 as there was no language contained in the Hills heirs' deed to Greenwood reserving any additional properties to them. As the Hill heirs failed to reserve the servient estate in the 20.29 acres, they had nothing to transfer to the appellant herein, Ann Morgan Zimmerer, by virtue of the various quitclaim deeds. Therefore, Ann Morgan Zimmerer was not an abutting land owner entitled to any preference in the acquisition of the surplus highway right-of-way.

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[4] See affidavits of Mark E. Romano and Robin J. Romano to Plaintiffs' Motion for Summary Judgment and Motion of Romanos for Summary Judgment.

Furthermore, as the parties agreed to submit their respective motions for summary judgment, the parties acknowledged by virtue of their filing of these motions that there were no genuine issues of fact to be determined between the parties. Therefore, the Circuit Court of Nicholas County did not err as a matter of law when it held that the Zimmerers own no portion of the 82.36 acres, more or less, and that the Zimmerers were not "principle abutting landowners" as they were not the original persons from whom the property was originally taken in 1971. Further, the Court correctly ruled that the Zimmerers were not entitled to any preference in acquiring any portion of the surplus right-of-way as they were not abutting land owners. As the parties mutually submitted their motions for summary judgment, obviously there were no genuine issues of fact to be determined by the fact finder. Therefore, the Romanos respectfully request that the Court deny the Zimmerers petition for appeal and affirm the Order of the Circuit Court of Nicholas County, West Virginia.

III. DISCUSSION OF LAW

(A) STANDARD OF REVIEW

This case arises by virtue of the Zimmerers' appeal of the lower court's award of Summary Judgment in favor of the Romanos. As noted, the Zimmerers and Romanos agreed to submit their respective motions for summary judgment. At that point, each party asserted that there were no genuine issues of fact between the parties. In fact, the parties participated with the Court without objection in fashioning the legal issues to be determined. Only after the Motion for Summary Judgment was granted in favor of the Romanos did the Zimmerers complain and assert that there were issues of fact to be determined. At this point, any objections they had were waived.

Appellate review of a Circuit Court's Order entering summary judgment is de novo. *Koffler v. City of Huntington*, 196 W.Va. 202, 469 S.E.2d 645 (1996). This standard also applies to the

appellate court's review of an issue of statutory interpretation. *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). However, unless the judgment of the lower court is plainly wrong, the court must affirm it. *Serge v. Matney*, 165 W.Va. 801, 273 S.E.2d 818 (1980). "On appeal to this Court, the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains all presumptions being in favor of the correctness of the proceedings, and judgment in and of the trial court." *Ross v. Ross*, 187 W.Va. 68, 415 S.E.2d 614 (1992) "When the evidence is conflicting, unless the circuit court's conclusion is plainly wrong, the decree appealed from will be affirmed." *Naughton v. Taylor*, 50 W.Va. 233, 40 S.E. 352 (1901) Therefore, the determination of the lower court can only be set aside on appeal if it is determined to be clearly erroneous.

(B) THE CIRCUIT COURT'S CONCLUSION THAT THE ROMANOS WERE VESTED WITH FEE SIMPLE TITLE TO THE 1.18 ACES WAS PROPER AND SUPPORTED BY THE EVIDENCE

The issues before the Court in this matter are relatively simple despite the assertions in the appellant's brief. The first issue is whether the Circuit Court of Nicholas County, West Virginia, appropriately interpreted the deed from the Hill heirs to Greenwood Timber. In that regard, the Court found that the Hill heirs reserved nothing except the right-of-way obtained by the West Virginia Department of Highways in 1971. The Hill deed described the entire 82.65 acre original tract reserving only therefrom the 20.29 acres of right-of-way previously condemned by the West Virginia Department of Highways. Therefore, it is the position of the Romanos that the deed is not ambiguous and clearly conveys the 82.65 acres reserving only the 20.29 acres of right-of-way previously condemned by the West Virginia Department of Transportation. Therefore, the circuit court properly concluded that the Hill heirs retained no portion of the 82.65 acre parcel.

However, in the event that the Court views the deed as ambiguous, a leading case applicable to the facts in this case is *Weekly v. Weekly*, 126 W.Va. 90, 27 S.E.2d 591 (1943) which provides that "If the language of a deed be unambiguous, and the language employed has a common and accepted meaning, there would seem to be no reason why we should seek to attach thereto a meaning and interpretation different from that commonly accepted. Where a deed will admit of two constructions, the construction which favors the Grantee will be adopted." In the event that the Court finds that the Hill/Greenwood deed contains an ambiguity, without a doubt, the facts of this matter in light of the rules of construction as provided in *Weekly* with regard to the deed as noted above, compelled the lower court to rule in favor of the Romanos. Additionally, this Court is compelled by *Weekly* to construe any ambiguity in the deed against the Hill heirs and to hold that the Romanos were vested with fee simple title to the 82.65 acre parcel subject only to the West Virginia Department of Transportation's right-of-way of 20.29 acres.

Additionally, the quitclaim deeds from the Hill heirs to Ann Morgan Zimmerer actually conveyed nothing.[5] These deeds are quitclaim deeds conveying whatever interest, if any, the Hill heirs had in said tract to Ann Morgan Zimmerer. As the Hill heirs owned no interest in said tract, and apparently never asserted an interest in said tract prior to the filing of the underlying case, these deeds conveyed nothing to Ann Morgan Zimmerer.

A quitclaim deed is defined in *Black's Law Dictionary* as "a deed that conveys a grantor's complete interest or claim in certain real property that neither warrants nor professes that the title is valid." Further, "a quitclaim deed purports to convey only the grantor's present interest in the land, if any, rather than the land itself. It's use excludes any implication that he had good title, or any title

[5] See Exhibit No. 5 to Romanos' Second Motion for Summary Judgment

at all...." Robert Kratovil, Real Estate Law (6th Ed. 1974). In short, it is compelling that the Hill heirs utilized a quitclaim deed to convey any interest they may have to Ann Morgan Zimmerer. By virtue of their quitclaim deeds, the Hill heirs did not warrant title to the property and by implication they claimed no title to the subject real estate whatsoever. It is quite compelling to note that the quitclaim deeds were prepared by Ann Zimmerer.

In *Maddy v. Maddy*, 87 W.Va. 581, 105 S.E. 803 (1921), the Court held that "in construing a deed, will or other written instrument, it is the duty of the Court to construe it as a whole taking and considering all the parts together, giving effect to the intention of the parties whenever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith." In *White Flame Coal Co. v. Burgess*, 86 W.Va. 16, 102 S.E. 690 (1920), the Court found that in cases where the intent of the parties to a deed is unclear and no other rule of construction can resolve the ambiguity, that doubt is resolved in favor of the grantee.

This Hill/Greenwood deed purports to convey 82.65 acres described in said deed. Thereafter, the only language limiting the extent of the grant is the language describing the 20.29 acres outconveyance to the West Virginia Department of Highways. Obviously, the draftsmanship of this deed was poor especially in light of the fact that there was never an outconveyance to the West Virginia Department of Highways in the first instance. Title vested in the West Virginia Department of Highways by virtue of a court order. It is clear from a review of the deed that all parties incorrectly interpreted the condemnation order as vesting fee simple interest to the 20.25 acres in the Department of Highways. There are no other words of limitation in the Hill deed which arguably apply. Therefore, in considering the entire Hill/Greenwood deed in this matter in that it purports to convey the entire 82.65 acres described therein and the only words of limitation contained in the

deed described the property previously vested in the West Virginia Department of Highways containing in total 20.29 acres, the deed is clear when considering its entirety that the only reservation was a right-of-way. There is no language in the deed reserving the servient 20.29 acres to the Hills. Therefore, the Romanos assert that in the first instance there is no ambiguity in that the deed clearly conveys to the Romanos' predecessor 82.65 acres, reserving only the 20.29 acres vested in the West Virginia Department of Highways by virtue of the 1971 Condemnation Order. However, should the Court determine that the deed is ambiguous, the rules of construction provide that the intent of the parties must be gleaned from the four corners of the document. In the event that the intention of the parties cannot be determined from a review of the entire document, such ambiguity is construed against the Grantors, the Hill heirs, and in favor of the Grantee, Greenwood Timber, the Romanos' predecessor in title.

The position of the Zimmerers in their brief is contradictory. In the first instance, they argue that the West Virginia Department of Transportation by virtue of *West Virginia Code* §17-2A-17 can only be vested with a right-of-way and not fee simple title. However, in their arguments with regard to the construction of the Hill deed, the appellants seemingly argue that the language in the deed purports to reserve to the Grantors the servient estate subject to the 20.29 acres vested in the West Virginia Department of Transportation. Obviously, as the West Virginia Department of Transportation can only be vested with a right-of-way by virtue of §17-2A-17 of the *Code*, the language in the deed can only reserve the 20.29 acres of right-of-way. Consequently, as the deed description in the Hill heirs deed to Greenwood described the entire 82.65 acres reserving only the right-of-way vested in the West Virginia Department of Highways, clearly the deed conveyed the

entire 82.65 acre parcel, including the 20.29 acres of servient estate subject to the West Virginia Department of Highway's 20.29 acres right-of-way.

The Romanos strongly take issue with the assertion of the appellants that the Romanos engaged in subterfuge. As can clearly be observed from a review of the deed conveying the 1.18 acres from the West Virginia Department of Transportation, Division of Highways, to the Romanos, the deed was prepared by the West Virginia Department of Transportation, Division of Highways.[6] There is nothing in the record in this case to indicate that the Romanos had any role in the drafting of this deed. The inclusion of the allegation of subterfuge in the appellants' brief can only be viewed as an intent on the part of the appellants to wrongly cast the Romanos in some sort of bad light or accuse them of wrongdoing before the Court. To assert that the Romanos have the ability to manipulate a state agency in a matter involving a $2,600.00 interest in land, is simply ridiculous.

Based upon the rules of construction, the Circuit Court's conclusion that the Hill heirs reserved nothing but the 20.29 acres of right-of-way previously vested in the West Virginia Department of Transportation, Division of Highways, is clearly correct and supported by the evidence.

(C) THE COURT CORRECTLY CONSTRUED WEST VIRGINIA CODE §17-2A-19 IN CONCLUDING THAT THE APPELLANT'S WERE NOT PRINCIPAL ABUTTING LAND OWNERS ENTITLED TO THE RIGHT OF NOTICE AND FIRST REFUSAL OVER ALL OTHER ABUTTING LAND OWNERS TO PURCHASE THE DIVISION'S VACATED RIGHT-OF-WAY

As the deed from the Hill heirs to the appellant herein, Ann Morgan Zimmerer, conveyed nothing, the appellants were not entitled to any preference with regard to the transfer of excess right-of-way at issue in this case. The West Virginia Department of Transportation, Division of

[6] See Exhibit No. 4 to the Romanos' Second Motion for Summary Judgment.

Highways, is statutorily authorized by virtue of §17-2A-1, et seq. of the *Code* to declare excess property not necessary for state road purposes as surplus property and sell same. This procedure for selling excess right-of-way is set out in §17-2A-19(c)(1) of the *Code*. The provision provides an alternative method for transferring surplus property in that property shall be first offered to the principle abutting land owners. Principle abutting land owner is defined in §17-2A-19(c)(3)(A)(i) of the Code as an individual from whom the real estate was acquired or his or her surviving spouse or descendent. Clearly, Ann Morgan Zimmerer does not meet the definition of a principle abutting land owner as she is not the person from whom the property was acquired, his or her surviving spouse or a descendent. In *McCoy v. Vankirk*, 201 W.Va. 718, 500 S.E.2d 534 (1997), the Court found that this referenced statutory provision creates three different groups of potential purchasers of surplus highway property These individuals are abutting land owners, principle abutting land owners and the general public. The appellants do not belong to any of the three classes entitled to first preference. In *Mills v. Van Kirk*, 192 W.Va. 695, 453 S.E.2d 678 (1994), the Court determined that the Commissioner of Highways is vested with reasonable discretion in determining the intended meaning of the statute and the Court may not substitute its judgment for the Commissioner's in the absence of an error of law or arbitrary, oppressive or manifest abuse of authority. None of these elements exist in this case. Further, if the Court adopts the appellants position that the appellants are principal abutting landowners, the Romanos for the same reasons are likewise principal abutting landowners.

The Romanos have been determined by the lower court to be the abutting land owners. Additionally, as the appellants herein are not abutting land owners as they acquired nothing in their deeds from the Hill heirs, they were not entitled to any preference under the statute and in light of

the holding in *McCoy*. The right-of-way vested in the West Virginia Department of Transportation by virtue of the condemnation order in 1971 lies between the Romano 82.65 acre tract and the public highway. Additionally, the Romanos were vested with title to the servient estate in the 20.29 acres. Therefore, the Romanos are clearly the abutting land owner. As Ms. Zimmerer received nothing by virtue of the quitclaim deeds from the Hill heirs, she is not entitled to preference as she is simply a member of the general public. Abutting land owners have priority over the general public under the Code and in light of the holding in *Mills*. Given the discretion the Commissioner of the West Virginia Department of Transportation has, the department properly transferred the property to Romanos and the circuit court properly affirmed same.

Additionally, as set forth in §17-4-47(4)(b) of the *Code* which provides that "except for where the right of access has been limited by or pursuant to law, every owner or occupant of the real property abutting upon any existing state highway has a right of reasonable means of ingress to and egress from such highway...." Therefore, the West Virginia Department of Transportation, Division of Highways, is mandated by statute to provide the Romanos with access from their 82.65 acre residue to the public highway. Given the wide discrection the commissioner has as set forth in *Mills* to declare excess rights of way and the statutory mandate of §17-4-47(4)(b) of the *Code*, this was exactly what was accomplished when the Commissioner deeded to the Romanos the West Virginia Department of Transportation's interest in the 1.18 acre parcel.

By virtue of this statutory provision, if the 1.18 acre parcel was determined to be excess property, the only persons or entity that could acquire the rights of the West Virginia Department of Transportation were the Romanos. By vesting title in the 1.18 acres in the appellants, the Commissioner would be in violation of §17-4-47(4)(b) of the *Code* in that the Romanos access to

the public highway would be cut off and the West Virginia Department of Transportation would then be forced to reacquire by whatever means access for the Romanos.

When viewed in consideration of the facts in this case, the statutory provisions set forth herein mandate a clear course of action for the Commissioner of the West Virginia Department of Transportation, Division of Highways. As there were no principal abutting landowners and the Romanos were the only abutting land owners and as the Commissioner was mandated by statutory provision to provide the Romanos with access to the public highway, once the property was determined to be excess property, the Commissioner could only transfer the 1.18 acre right-of-way vested in the West Virginia Department of Transportation to the Romanos.

Under the statute, the only way that the appellants herein could be construed to be principle abutting land owners was for them to be the original persons from whom the property was taken, the surviving spouse of such person or a descendent of such person. Had the legislature intended to include assignees of the three classes set forth in §17-2A-19, it could have easily chosen to do so. As this language is not included in the statute, the Zimmerers are not entitled to assert that they are principle abutting land owners. The commissioner cannot by rule or otherwise expand this statutory definition to include assignees of the original owners. Furthermore, as the Zimmerers acquired nothing in the quitclaim deeds from the Hill heirs, even had the legislature provided for assignees of the original land owners as the class to be given preference, they would not have been entitled to this classification.

The Zimmerers argument is that as "abutting land owners" they were entitled to a right of first refusal as to the excess right-of-way held by the Division. However, this argument by the Zimmerers clearly ignores the mandates of §17-4-47(4)(b) of the *Code* which basically ensures that

all owners of real property abutting upon any existing state highway have a right of reasonable means of ingress to and egress from such highway. It also ignores that under their theory, the Romanos are likewise principal abutting landowners. Also, the argument by the appellants in this case that the right-of-way at issue here was controlled access right-of-way further does not apply. The access gained by the Romanos by virtue of the deed from the West Virginia Department of Transportation was not to U.S. Route 19, a controlled access highway, but rather to a feeder roadway to U.S. Route 19 and thus was non-controlled access right-of-way.[7]

(D) THE CIRCUIT COURT PROPERLY RULED THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACTS EXISTING FOR JURY DETERMINATION IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE ROMANOS

A motion for summary judgment should only be granted when it is clear that there is no genuine issue of fact to be tried and inquiry to determine the facts is not desirable to clarify the applications of law. *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963) The parties in this case agreed to submit their respective motions for summary judgment. In fact, the parties participated with the Court in fashioning the legal issues remaining in the case to be determined by the Court. Thus, as the parties participated in this process without objection and filed their respective motions for summary judgment, clearly the parties acknowledged that there were no genuine issues of fact to be determined. Only after the Zimmerers lost their motion for summary judgment did they argue that there were remaining issues of fact to be determined in this case. Prior to that ruling, they had asserted in their own motions for summary judgment that there were no genuine issues of fact remaining in this case. As they asserted that there

[7] See Exhibit No. 1 to Romanos' Second Motion for Summary Judgment.

were no genuine issues of fact, they should not be now allowed to argue otherwise after losing on their motion. Further, the fact that the Court did not consider the affidavits submitted by the appellants in support of their motion for summary judgment on the issue of the title to the servient 20.29 acres was proper given the rules of construction set forth in *Weekly*. The Court clearly concluded based upon a reading of the entire document either that an ambiguity did not exist and that the deed conveyed to Greenwood Timber, the Romanos predecessor, 85.65 acres reserving only 20.29 acres of right-of-way previously vested in the West Virginia Department of Highways or that the deed contained an ambiguity and construed such ambiguity against the grantors therein, the Hill heirs. Either way, there were no genuine issues of fact existing and only matters of law to be determined by the Court.

Alternatively, had there been genuine issues of fact existing in this case, the appellants objections were waived when they participated in fashioning the issues of law with the court and filed their motion for summary judgment.

IV. CONCLUSION

Based upon the foregoing, the Circuit Court of Nicholas County properly concluded that the deed from the Hill heirs to Greenwood Timber conveying 82.65 acres reserved only the 20.29 acres of right-of-way previously vested in the West Virginia Department of Highways. As the deed from the Hills heirs to Greenwood Timber transferred all the estate owned by the Hill heirs, they were vested with nothing to subsequently transfer to the appellant, Ann Morgan Zimmerer. This is reflected by virtue of their use of quitclaim deeds. It is important to note that the quitclaim deeds executed by the Hill heirs were prepared by Ann Zimmerer. The quitclaim deed signified the Hill heirs claimed nothing and by virtue of their deed to Greenwood Timber, in actuality owned nothing

to transfer to Zimmerer. Consequently, these quitclaim deeds vested no rights in Ann Morgan Zimmerer to claim either as an abutting land owner or principle abutting land owner any rights preferential to those of the Romanos in this case. This Commissioner of the West Virginia Department of Transportation, Division of Highways, recognized that the department had a statutory obligation to provide access to the public highway to the Romanos and did not abuse its discretion in transferring 1.18 acres of excess right-of-way to them. In light of the statutory provisions and case law providing for the disposal of excess right-of-way and the statutory mandate to provide the Romanos with access to the public highway, clearly the Commissioner used sound discretion in conveying same to the Romanos.

However, should the Court conclude that the circuit court below erred in determining that the Zimmerers own no interest in the 20.29 acres servient estate, then clearly the excess right-of-way is necessary for public road purposes to provide the Romanos with access to the public highway. Therefore, if said excess right-of-way is necessary for public highway purposes, the West Virginia Department of Transportation, Division of Highways, cannot dispose of same and the Zimmerers cannot acquire the property. Consequently, their arguments are moot.

Based upon the foregoing, the rulings of the Circuit Court of Nicholas County, West Virginia are clearly not erroneous and are supported by the evidence in this case.

Wherefore, the appellees, Mark E. Romano and Robin J. Romano, pray that the Court enter judgment denying the appeal of the appellants herein and affirm the Order of the Circuit Court of Nicholas County, West Virginia.

MARK E. ROMANO and
ROBIN J. ROMANO
By Counsel

Gregory A. Tucker, Esq.
Gregory A. Tucker, P.L.L.C.
719 Main Street
Summersville, WV 26651
(304) 872-2500
State Bar I. D. No. 3810

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October, 2008, I served the foregoing RESPONSE BRIEF OF APPELLEES MARK E. ROMANO AND ROBIN J. ROMANO upon the following individuals by mailing a true and accurate copy thereof to each party at their respective addresses by U. S. Mail, postage prepaid:

Ancil G. Ramey, Esq.
Hannah B. Curry, Esq.
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588

G. Alan Williams, Esq.
WVDOH-Legal Division
Capitol Building 5 Room 519
Charleston, WV 25305

Gregory A. Tucker, Esq.
Gregory A. Tucker, P.L.L.C.
719 Main Street
Summersville, WV 26651
(304) 872-2500
State Bar I. D. No. 3810